(6)

No. 96-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by "clear and convincing" evidence?

2. In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence--no matter how strong--shows the official's actual reason for the act was unconstitutional?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were Leonard Rollon Crawford-El, plaintiff-appellant, and Patricia Britton and the District of Columbia, defendants-appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, appear in the Appendix to the Petition for Writ of Certiorari ("App. to Pet. for Cert.") at 1a-95a and are reported at 93 F.3d 813. The district court's opinion dismissing petitioner's complaint, App. to Pet. for Cert. 115a-141a, is reported at 844 F. Supp. 795. The district court's opinion denying reconsideration, App. to Pet. for Cert. 110a-114a, is reported at 863 F. Supp. 6.

The opinion of the court of appeals on respondent's interlocutory appeal appears at App. to Pet. for Cert. 145a-160a. It is reported at 951 F.2d 1314.

Other opinions and orders entered in the case are unreported.

JURISDICTION

The judgment of the court of appeals was entered August 27, 1996. The petition for writ of certiorari was filed November 25, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Crawford-El, a District of Columbia prisoner, filed a complaint in the district court under 42 U.S.C. § 1983 alleging, *inter alia*, that respondent Britton, a District of Columbia Department of Corrections official, retaliated against him for his exercise of First Amendment rights. Petitioner's First Amendment retaliation claim against Britton, the only claim addressed by the *en banc* court of appeals, is the only claim at issue.[1]

Facts

The district court stated the First Amendment retaliation claim against Britton as follows:

> Crawford-El had a history in prison of speaking to the press about poor prison conditions and of filing lawsuits against Britton and other prison officials and the government. He had communicated with newspaper reporters, filed

[1] The appellate court's disposition of petitioner's First Amendment retaliation claim against the District of Columbia, arising from the same incidents, was entirely in petitioner's favor. App. to Pet. for Cert. 96a-99a.

> informal requests for redress of grievances, aided other prisoners who were seeking redress, made persistent requests for the return of his property, and pursued litigation against Britton and other Department of Corrections employees or the District of Columbia. (Fourth Amended Complaint, at ¶¶ 41(a), 48.) Britton, he alleges, intentionally withheld and diverted his property during the transfers in order to retaliate for this "legal troublemaking," violating his First Amendment rights to freedom of speech and to petition for redress of grievances. As a result, he claims to have been forced to incur the cost of replacing clothing and shipping his boxes to himself, and to have suffered emotional distress.

App. to Pet. for Cert. 126a. In support of this claim, petitioner's verified complaint reported specific incidents in which respondent manifested her knowledge of petitioner's First Amendment activity, her hostility toward him on account of it, and her retaliatory intent. As the district court noted:

> (1) Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prisoners prepare their Administrative Remedy Prodedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)
>
> (2) Crawford-El helped found an Inmate Grievance Committee to protest the lack of prisoner clothing and the correctional staff's persistent inability [to] account for all prisoners in time for the prisoners' morning educational programs. Britton knew about Crawford-El's role in the Inmate Grievance Committee, and he alleges that it made her hostile towards him. When Crawford-El was typing in a

correctional office as part of his clerical job, Britton caustically told the captain for whom he worked to make sure Crawford-El was not typing up lawsuits or grievance complaints. Britton then stood over him to see what he was typing. (Fourth Amended Complaint, at ¶¶ 7, 9.)

(3) On April 20, 1986, The Washington Post published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She [attempted to place him in restrictive confinement,] threatened to make life hard for him in jail any way she could [for as long as he was incarcerated, and had him transferred to another facility]. (Fourth Amended Complaint, at ¶ 12.)

(4) Britton stated on another occasion [a December 1988 airplane trip transferring Crawford-El and others to Washington State] that prisoners like Crawford-El "don't have any rights." [She made this remark in response to complaints by Crawford-El and other prisoners on the airplane that an officer's videotaping of them handcuffed and chained violated their privacy.] (Fourth Amended Complaint, at ¶ 15.)

(5) After the publication of a second The Washington Post article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were 'jailhouse lawyers'--troublemaking 'writ-writers' who tied up the courts with occasionally successful lawsuits against the prison system" and quoted Crawford-El to that effect ["What you have here are the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds"], Britton told another prison official that

Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at ¶¶ 16-17.)

App. to Pet. for Cert. 129a-130a (district court opinion) and App. to Pet. for Cert. 178a-180a (additional details stated in the Fourth Amended Complaint).

During the six months following the December 1988 transfer to Washington State, Crawford-El and several other prisoners submitted to the D.C. Mayor letters noting their intent to sue the District of Columbia over the videotaping that Britton had allowed during the transfer. App. to Pet. for Cert. 181a.

Soon thereafter, in July 1989, Britton told Washington State authorities to seize and send to her office in the District of Columbia all of the transferred prisoners' property, because the prisoners were to be moved again. App. to Pet. for Cert. 181a-182a. During the next several weeks, prison officials sent Crawford-El to various facilities, and then to the federal prison in Marianna, Florida. During this period Crawford-El wrote to Britton, and spoke with her in person and by telephone, repeatedly telling her that he needed the legal materials she had seized. App. to Pet. for Cert. 183a-185a. Britton, however, diverted Crawford-El's property outside prison channels to Crawford-El's brother in law, Jesse Carter, whom Crawford-El had not authorized to receive it. App. to Pet. for Cert. 184a-185a. She told Carter that Crawford-El "should be happy she did not throw it in the trash." App. to Pet. for Cert. 186a.

Because Britton had diverted Crawford-El's property outside prison channels, federal prison officials in Marianna initially refused to allow Crawford-El to receive it when he had his mother mail it to him at his own expense. App. to Pet. for Cert. 188a. To receive his property, Crawford-El had to submit a grievance, which caused federal prison officials to become

hostile toward him. *Id.* He finally received his property in February 1990, over six months after Britton had seized it. *Id.*

District Court Opinion

The district court held that

> [a] jury might reasonably infer from [the complaint's] allegations that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker."

App. to Pet. for Cert. 131a. The district court also held that

> [b]ecause Crawford-El claims actual, financial injury, traceable directly to Britton's allegedly unconstitutional act, he has satisfied the injury requirement for his First Amendment claim.

App. to Pet. for Cert. 127a. The district court nonetheless dismissed this claim. The court held the complaint failed to plead "direct" evidence of Britton's unconstitutional intent, as required by circuit precedent applicable at the time. App. to Pet. for Cert. 131a.

***En Banc* Appellate Opinions**

The *en banc* court of appeals unanimously discarded the circuit's previous direct evidence rule. App. to Pet. for Cert. 11a-12a, 44a, 58a, 72a, 78a. Five members of the court, however, decided that Crawford-El must prove Britton's unconstitutional intent by "clear and convincing" evidence, in order to overcome her qualified immunity. App. to Pet. for Cert. 3a (opinion of Williams, J., in which three other judges joined); App. to Pet. for Cert. 58a (opinion of Ginsburg, J.). These five judges maintained that the evidence recited in Crawford-El's

verified complaint was not clear and convincing and that Britton would be entitled to summary judgment unless Crawford-El presented additional evidence meeting that standard. App. to Pet. for Cert. 34a, 71a. Judge Williams said Crawford-El should be required to present this evidence without being allowed any discovery. App. to Pet. for Cert. 3a. Judge Ginsburg would allow discovery if petitioner showed a "reasonable chance" that discovery would produce clear and convincing evidence of unconstitutional intent. App. to Pet. for Cert. 58a-60a.

Judge Silberman urged a different test. He said that an official who asserts a legitimate justification for a challenged act should be entitled to qualified immunity if the asserted justification would have been a reasonable basis for the act, even if evidence --no matter how strong--shows the official's actual reason was unconstitutional. App. to Pet. for Cert. 46a-50a.

Five members of the court rejected both the "clear and convincing" evidence standard and Judge Silberman's approach. They said the qualified immunity doctrine does not alter a plaintiff's burden of proof on the merits and that the evidence recited in petitioner's verified complaint entitles him to trial. App. to Pet. for Cert. 93a-94a.

SUMMARY OF ARGUMENT

The unprecedented holdings below that qualified immunity alters the burden of proof in cases of retaliation for exercise of First Amendment rights--five judges requiring "clear and convincing" evidence of unconstitutional intent, one judge requiring proof that a defendant's asserted justification is unreasonable, though evidence shows it was not the actual motive--fail to meet the heavy burden of justification required by *Anderson v. Creighton*, 483 U.S. 635 (1987). These proposals have no roots in common law immunity. They are unnecessary

to accomplish the purposes of qualified immunity recognized in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Firm application of the rules of civil procedure, *Harlow*, 457 U.S. at 819 n.35 (1982), is fully adequate to ensure the accomplishment of *Harlow*'s goal--dismissal of insubstantial claims without trial or broad-reaching discovery. *Id.* at 814. Under the federal rules, a bare allegation of unconstitutional intent does not entitle a plaintiff to discovery. A defendant, moreover, may quickly discover the basis, if any, for a plaintiff's allegation and obtain summary judgment against a plaintiff who can show neither admissible evidence of unconstitutional animus nor a reasonable likelihood of discovering it. A plaintiff who shows only a reasonable likelihood of successful discovery is entitled only to discovery "tailored specifically" to that showing, *Anderson*, 483 U.S. at 647 n.6, after which the defendant again is entitled to seek summary judgment, asserting either absence of evidence of unconstitutional intent or proof that the same action would have been taken in any event for a legitimate reason. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). These standards fully satisfy the need for prompt dismissal of insubstantial First Amendment retaliation claims.

Adoption of either the "clear and convincing" evidence standard or Judge Silberman's proposal would have consequences that are far-reaching and deleterious. In several settings, an action for damages against individual government officials is the only judicial remedy capable of vindicating constitutional rights. The legal standards proposed below by six judges would imperil First Amendment claims arising from government agents' covert destruction of political organizations, *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984). They would imperil discrimination claims and the claims of government employees and prisoners who suffer official retaliation for protected speech on matters of public concern. They would endanger civil liberty and democracy.

ARGUMENT

I. A PROPOSAL TO BALKANIZE QUALIFIED IMMUNITY BY TYPE OF CONSTITUTIONAL CLAIM FACES A HEAVY BURDEN OF JUSTIFICATION

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court rejected a proposal to except from "the usual principles of qualified immunity" a particular type of Fourth Amendment claim. *Id.* at 642. The Court said this proposal faced a "heavy burden" and "emphasized that the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'" *Id.*, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring). The Court held

> we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the . . . precise character of the particular rights alleged to have been violated. . . . We are unwilling to Balkanize the rule of qualified immunity . . . at the level of detail the Creightons propose.

Anderson, 483 U.S. at 643, 646.[2]

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[2] "An immunity that has as many variants as there are . . . types of rights would not give . . . that assurance of protection that it is the object of the doctrine to provide," *Anderson*, 483 U.S. at 643--at least not until the variant of immunity for each type of right were finally decreed. Until that time, prospective government officials could not properly assess whether the risks of liability seem to them to be too great to make government employment attractive. *Harlow*, 457 U.S. at 814 (avoiding "deterrence of able citizens from acceptance of public office" is an important goal of qualified immunity). If the extent of immunity from one type of claim were greater (out of perceived need to avoid deterrence of job applicants) than that for another, with the extent of immunity as to many other types of claims unknown, an (footnote continued)

The Balkanizing proposals proffered below would create, for a particular category of claims, qualified immunity that borders on absolute immunity. Chief Judge Edwards, joined by four other judges, noted that the opinions of their six opposing colleagues

> invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials--whether or not meritorious--would *never* be able to survive a defendant's assertion of qualified immunity.

App. to Pet. for Cert. 78a (emphasis in original).

There is, however, a "presumption . . . that qualified, rather than absolute, immunity is sufficient to protect government officials in the exercise of their duties," *Burns v. Reed*, 500 U.S. 475, 486-487 (1991). "The burden of justifying absolute immunity rests on the official asserting the claim." *Harlow*, 487 U.S. at 812. Absolute immunity, moreover, is based on the nature of an official function, not the type of constitutional violation at issue. Absolute immunity is granted only for performance of "functions[s] so sensitive as to require a total shield from liability." *Id.*[3]

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official who would be deterred from employment unless the greater degree of immunity also applied to many other claims would be unable to make an informed choice to enter government service. Proposals to increase the extent of qualified immunity with respect to one type of claim would inject uncertainty into immunity law, just as would proposals to diminish the scope of immunity as to a particular type of claim.

[3] Respondent Britton does not perform such functions. *Butz v. Economou*, 438 U.S. 478 (1978).

Immunity from liability under 42 U.S.C. § 1983 is "essentially a matter of statutory construction." *Butz v. Economou*, 438 U.S. 478, 497 (1978). "Section 1983, on its face, [however], admits of no defense of official immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). The source of immunity is the presumption that Congress did not intend to abolish common law immunities "well established in 1871, when 1983 was enacted." *Id.*, quoting *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967). For this reason, the *Buckley* Court said,

> "[w]e do not have a license to establish immunities from 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-923 (1984). "[O]ur role is to interpret the intent of Congress in enacting 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

509 U.S. at 268.[4]

Public policy considerations can warrant adjustment of the contours of historically-rooted immunity. *Anderson*, 483 U.S. at 645. In *Harlow*, presidential aides "advanced persuasive arguments" requiring "an adjustment" of the immunity standard stated in *Wood v. Strickland*, 420 U.S. 308 (1975). *Harlow*, 457 U.S. at 815. In response to these arguments, *Harlow* retained only the objective component of the *Wood* standard, which denied immunity for violations of "clearly established constitutional rights." *Wood*, 420 U.S. at 322. The Court trimmed away alternative subjective elements that denied immunity if an official had "malicious intention to cause a deprivation of constitutional rights or other injury," *id.*, even if

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[4] *See also*, Argument II of the brief for amicus William G. Moore, Jr.

no violation of clearly established constitutional rights had occurred.[5]

The purpose of the *Harlow* adjustment was to ensure "the dismissal of insubstantial lawsuits without trial." *Harlow*, 457 U.S. at 814. Under *Harlow*, "insubstantial lawsuits" are those presenting no violation of clearly established constitutional law. Absence of such a violation is dispositive. Mere subjective desire to cause either a constitutional violation or "other injury" is, by itself, no longer a basis for denial of immunity.

Harlow illustrates the type of adjustment in the qualified immunity doctrine which public policy considerations can warrant by themselves, without reference to common law. Prior to *Harlow*, a plaintiff could obtain a damage award against an official for a constitutional violation not clearly established in law at the time the official acted, but only if the official happened to have subjectively desired to inflict either (a) harm believed by the official (correctly or incorrectly) to be a constitutional injury or (b) some other type of injury. *Harlow* trimmed away these odd considerations, which are irrelevant to deterring and compensating injured persons for violations of clearly established constitutional rights, and which would compensate the injured for newly-recognized violations only in odd or fortuitous circumstances.

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[5] The *Anderson* opinion said *Harlow* had "completely reformulated qualified immunity [by] . . . *replacing* the inquiry into subjective malice . . . with an objective inquiry into the legal reasonableness of the official action." 483 U.S. at 645 (emphasis added). The objective inquiry, however, had been included in the *Wood* standard. 420 U.S. at 322. *Harlow* stripped away the subjective malice inquiry, *leaving* the previously-announced objective component as the only test.

Like the instant case, *Harlow* concerned a First Amendment retaliation claim. Unlike the opinions of six judges below, however, *Harlow*'s adjustment in immunity law did not alter plaintiffs' burden of proof on the merits. Nor did the *Harlow* adjustment create a standard bordering on absolute immunity. *Harlow* expressly considered, and rejected, the defendant officials' claim of absolute immunity. *Harlow* does not support the proposition that the type of unprecedented and "astonishing" alterations in qualified immunity proposed by six judges below are within the Court's power to order solely on the basis of public policy "cost-benefit analysis." App. to Pet. for Cert. 78a, 87a (opinion of Edwards, C.J.). Under *Butz*, *Buckley*, *Tower* and *Malley*, the heavy burden faced by the changes proposed below includes the burden of finding support in the well-established common law of 1871. Analysis attempting to justify these changes solely on the basis of public policy can only be deemed to be "freewheeling," and impermissible.

II. THE BALKANIZING PROPOSALS URGED BELOW ARE UNSUPPORTED BY COMMON LAW AND UNNECESSARY TO ACCOMPLISH THE PURPOSES OF QUALIFIED IMMUNITY

The opinions below urging drastic change of the evidentiary standards in First Amendment retaliation cases do not claim to find support in the common law. This is not, moreover, merely because there is no analogous common law counterpart to a First Amendment retaliation claim.[6] In 1871, no common law immunity, from any type of claim, imposed the clear and

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[6] Although the particular retaliatory acts at issue here constitute common law conversion, *Fotos v. Firemen's Ins. Co.*, 533 A.2d 1264 (D.C. 1987), conversion is not generally analogous to retaliation for exercise of First Amendment rights.

convincing evidence standard proposed below by five judges, let alone the unusual framework suggested by Judge Silberman.[7] For this reason alone, the Court should hold that reading into § 1983 the proposals of these six judges is simply not a permissible means of statutory construction.

Apart from this point, it is also true that the changes proposed below are unnecessary to accomplish the purposes of the qualified immunity doctrine. This emerges from the reasoning of *Harlow*, developments in summary judgment law since *Harlow* was decided, and differences between First Amendment retaliation claims and claims arising under the pre-*Harlow* qualified immunity standard.

In *Harlow* the Court stripped away the subjective elements of the *Wood* standard to ensure "the dismissal of insubstantial lawsuits without trial." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The Court reasoned that "an official's subjective good faith has been considered to be a question . . . inherently requiring resolution by a jury," and that "there is often no clear end to the relevant evidence" regarding a subjective intent that arises from a "decisionmaker's experiences, values, and

[7] Even if the absence of a common law counterpart to First Amendment retaliation claims were thought to be a factor distinguishing this case from those in which appropriate common law counterparts can be identified, this "silence" of the common law would not justify immediate resort to freewheeling policy analysis. "[D]evising limitations to a remedial statute, enacted by Congress," is not the same judicial task as developing the common law. *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Mere failure of a federal statute to contemplate a particular situation does not empower the judiciary to fill the perceived gap with a decision based on cost-benefit analysis. Amendment of the statute, if appropriate, is a task for Congress. *See* Chief Judge Edwards's opinion, App. to Pet. for Cert. at 78a.

emotions." *Id.* at 816-17. The Court said, "[j]udicial inquiry into [such] motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues"--an inquiry "peculiarly disruptive of effective government." *Id.* at 817. For these reasons, the Court concluded "that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. The Court called for "firm application of the Federal Rules of Civil Procedure" to accomplish this end. *Id.* at 819, n.35, quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978).

Harlow, however, did not announce a change in the burden of proof in First Amendment retaliation cases. It is hardly apparent, moreover, that the Court thought, or would have thought, that its newly-announced qualified immunity adjustments are inadequate to ensure "dismissal of insubstantial [First Amendment retaliation] lawsuits without trial." *Harlow*, 457 U.S. at 814. *Harlow*, itself, involved a First Amendment retaliation claim.[8]

No other appellate courts have perceived the need for the "clear and convincing" evidence standard urged by Judge Williams. Chief Judge Edwards wrote:

> [I]f a "clear and convincing" evidence standard were truly necessary to vindicate defendants' [qualified immunity], as some of my colleagues seem to believe, one wonders why no other circuit has seen fit to embrace such a rule. Indeed,

[8] According to Judge Williams's reasoning, App. to Pet. for Cert. at 17a-18a, the *Harlow* Court must have either failed to realize that its adjustments were insufficient to accomplish the goals of qualified immunity in First Amendment retaliation cases or necessarily did realize this, but never said so. Either alternative is difficult to accept.

> although nearly every other federal appeals court in the nation has addressed the precise issue that we face today, *not one* has adopted a standard even approaching the positions offered by my colleagues who view this case differently.

App. to Pet. for Cert. 87a-88a (emphasis in original) and 88a n.7 (collecting cases from ten circuits).

Further alteration of the *Harlow* standard is not necessary to accomplish the goals of qualified immunity in First Amendment retaliation cases. Contrary to Judge Williams's assumption, App. to Pet. for Cert. at 17a, First Amendment retaliation claims arising after *Harlow* do not present the same litigation burdens that were presented by pre-*Harlow* claims arising when subjective good faith was an element of qualified immunity. "[C]larifications to summary judgment law [after *Harlow*] have alleviated" the difficulty in "securing summary judgment regarding . . . subjective intent," enabling "the strength of factual allegations such as subjective bad faith [to be] tested at the summary-judgment stage." *Wyatt v. Cole*, 504 U.S. 158, 171 (Kennedy, J., concurring), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).[9]

Two differences between First Amendment retaliation claims and pre-*Harlow* cases governed by the *Wood* standard also support this point. First, unconstitutional intent is a more specific state of mind than the general malicious desire to inflict injury that precluded immunity under the *Wood* standard. Compared to subjective bad faith, retaliatory intent contemplates a narrower range of "decisionmaker[] experiences, values, and

[9] In *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995), for example, the court, on interlocutory appeal from denial of qualified immunity, ordered entry of summary judgment rejecting a First Amendment retaliation claim, without applying a heightened burden of proof.

emotions" and defines a "clear[er] end to the relevant evidence." *Harlow*, 457 U.S. at 816, 817. Judicial inquiry into this intent, limited by firm application of the federal rules, is less burdensome than pre-*Harlow* inquiry into subjective bad faith.

Second, a defendant in First Amendment retaliation cases can seek summary judgment on the ground that, even if unconstitutional animus might have been a substantial factor motivating the defendant's injurious act, the same action would have been taken for a legitimate reason. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). Summary judgment properly granted on this ground obviates the need for extensive inquiry into unconstitutional intent. The Court has recognized that "fending off baseless First Amendment lawsuits [on this ground] should not consume scarce government resources." *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996).

Chief Judge Edwards's opinion below showed specifically how "firm application of the Federal Rules of Civil Procedure" is "more than adequate to dispose of unmeritorious claims" prior to trial "without . . . new evidentiary standards designed to address particular categories of cases." App. to Pet. for Cert. at 85a. He cited the district court's power "to limit initial discovery to a brief interrogatory concerning the plaintiff's evidence relevant to immunity." App. to Pet. for Cert. 83a. This kind of initial discovery enables the defendant quickly to determine, before answering any discovery by the plaintiff, whether to seek summary judgment based on plaintiff's inability to prove unconstitutional intent. Under Rule 56, a plaintiff responding to such a summary judgment motion must either present evidence of unconstitutional intent or "show a reasonable likelihood" that allowing discovery by the plaintiff "will uncover evidence" proving that element of the claim. App. to Pet. for Cert. 84a. The district court's power to limit all discovery to "the needs of the case," in order to avoid undue "burden or expense," also

cited by Chief Judge Edwards, App. to Pet. for Cert. 83a and n.5 (quoting Fed. R. Civ. P. 26(b)(2)(iii)), can ensure that any discovery allowed under Rule 56(f) is tailored to the reasonable likelihood shown by the plaintiff.

These principles fully satisfy the need to dismiss insubstantial First Amendment retaliation claims without trial. Further alteration of the *Harlow* standard is unnecessary to accomplish this goal.[10]

III. A HEIGHTENED BURDEN OF PROOF IN UNCONSTITUTIONAL ANIMUS CASES WOULD IMPROPERLY BALANCE OFFICIALS' NEED FOR IMMUNITY AND THE COMPETING NEEDS FOR DETERRENCE OF UNCONSTITUTIONAL CONDUCT AND COMPENSATION OF VICTIMS

"The purpose of 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992), citing *Carey v. Piphus*, 435 U.S. 247, 254-257 (1978). "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

[10] Alteration of the qualified immunity standard solely for unconstitutional animus cases arguably would require further Balkanizing of qualified immunity, contrary to *Anderson v. Creighton*, 483 U.S. 635 (1987). For example, if preponderance of the evidence were deemed appropriate for all objective elements of claims, but clear and convincing evidence were required for unconstitutional animus, an intermediate standard arguably would be appropriate to prove a state of mind such as deliberate indifference to a prisoner's need for safety or medical care. *Farmer v. Brennan*, 114 S. Ct. 1970 (1994).

Due to States' Eleventh Amendment immunity, an action for damages against individual state officials is the only remedy for constitutional violations such as those alleged in *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (shooting of political demonstrators by National Guard troops).

The qualified immunity doctrine balances the purposes of § 1983 against the "social costs" incurred when "claims . . . run against the innocent." *Harlow*, 457 U.S. at 814. These costs include "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office," and the risk that fear of litigation will cause officials to be timid in the performance of their duties. *Id.* The balance is properly struck when insubstantial suits--those not based on clearly established law or not grounded in available facts and reasonable inferences--are dismissed without trial, and without broad-ranging discovery. *Id.* at 814, 815, 818.[11]

We have shown that the proposals of six judges below are not necessary to ensure prompt disposition without trial of insubstantial claims premised on unconstitutional animus. These proposals therefore fail to balance properly the purposes of § 1983 against the considerations supporting qualified immunity. The proposals below unnecessarily and severely restrict not only

[11] *Harlow* did not expressly mention available facts and reasonable inferences as criteria for judging the pre-trial substantiality of claims based on clearly established law, but these criteria can be inferred from *Harlow*'s demand for "firm application of the Federal Rules of Civil Procedure." 457 U.S. at 819, n.35. In general, a complaint, a request for discovery, an opposition to a motion to dismiss, or a pre-discovery opposition to a motion for summary judgment satisfies the rules applicable to these documents if it is based on valid points of law and grounded in available facts and reasonable inferences.

the right to trial of substantial, clearly-established claims, but also the ability of injured parties with meritorious claims to prevail and obtain redress.[12]

The consequences of the proposals below would be deleterious and far-reaching. They would diminish deterrence of unconstitutional discrimination, as well as impair the pursuit of redress in First Amendment retaliation cases.[13] The proposed legal standards would imperil First Amendment claims arising from government agents' covert destruction of political organizations. *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984). The result would endanger civil liberty and democracy. The proposed legal standards would leave government employees without effective relief from retaliation by their superiors for their exercise of First Amendment rights. Employee speech on public matters would be deterred, and public debate would suffer. *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994)

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[12] Judge Williams argued that his proposal for a clear and convincing evidence standard is supported by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), because there the Court, by analogy to federal officials' absolute immunity from common law libel claims, required that libel suits by officials seeking damages for published criticism of their performance of discretionary duties be supported by clear and convincing evidence of actual malice. App. to Pet. for Cert. 21a. The Court, however, adopted this standard to protect First Amendment freedom. Judge Williams's proposal would apply this standard to impair First Amendment liberty in favor of official immunity, which is not a constitutional right. Federal officials' absolute immunity from common law claims, moreover, is greater than their qualified immunity from constitutional claims. *Butz v. Economou*, 438 U.S. 478 (1978). The reasoning of *New York Times* therefore does not support Judge Williams's view. *See* Chief Judge Edwards's opinion, App. to Pet. for Cert. at 91a-92a.

[13] *See* the brief for amicus William G. Moore, Jr., at 8-9.

("[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions").[14] A similar point applies to prisoners' First Amendment claims. Unchecked retaliation against prisoners who communicate with the press, the public, and the courts about prison conditions would deter their speech on these important public matters, contrary to the public interest. *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971).

Even where recovery for injury might be obtained on other legal theories, the public interest would be disserved by perfunctory termination of substantial First Amendment retaliation claims arising from the same injury. If police shoot political demonstrators, it is in the public interest to allow the victims to pursue any substantial claim that official hostility to their political views motivated the shooting. Confining their suit to a Fourth Amendment excessive force claim would be incompatible with not only the view that posits the preferred position of First Amendment rights, *Kovacs v. Cooper*, 336 U.S. 77 (1949), but also the view that these rights deserve no less protection than other constitutional liberties.

CONCLUSION

The Court should hold that qualified immunity does not alter a plaintiff's burden of proof in First Amendment retaliation cases. The Court should embrace the opinion of Chief Judge Edwards and remand the case for further proceedings.

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[14] Knowledge that retaliation for protected speech, including the ruining of one's career, could be inflicted without the availability of an effective remedy would deter "able citizens from acceptance of public office," *Harlow*, 457 U.S. at 814, as readily as would insufficient qualified immunity.

Respectfully submitted,

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